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OCTOBER TERM, 1956

No. 864

JOHN T. MENZIES, PRESIDENT, CROSSE & BLACKWELL COMPANY; CHARLES P. McCORMICK, PRESIDENT, McCORMICK & COMPANY, INC.; AND SAMUEL H. HOFFBERGER, PRESIDENT, POMPEIAN OIL CORPORATION, *Petitioners,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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v.

FEDERAL TRADE COMMISSION, *Respondent.*

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John T. Menzies, President of Crosse & Blackwell Company; Charles P. McCormick, President, McCormick & Company, Inc.; and Samuel H. Hoffberger, President, Pompeian Olive Oil Corporation, pray that a writ of certiorari issue to review the judgment entered in this case on March 7th, 1957 by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit is unreported.[1] The opinion of the United States District Court for the District of Maryland is reported in 145 F. Supp. 164.[2] The opinion of the Federal Trade Commission dated March 15, 1956, is reported in Federal Trade Commission Docket No. 6470.[3]

[1] Appended to this Petition is copy of opinion.
[2] See Printed Appendix, p. 27.
[3] See Printed Appendix, p. 12.

JURISDICTION

The judgment sought to be reviewed was dated and entered by the United States Circuit Court of Appeals for the Fourth Circuit on March 7th, 1957. The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code, 28 U. S. C. 1254(1).

QUESTION PRESENTED

The issue in this case expressed in general terms is: Does the Federal Trade Commission have the power under the Federal Trade Commission Act to require a respondent corporation to produce its records in an administrative proceeding — not for any alleged violation of the Federal Trade Commission Act, and not brought under the Federal Trade Commission Act — but for an alleged violation of the Clayton Act as amended by the Robinson-Patman Act, and brought under the Clayton Act as amended by the Robinson-Patman Act?

The determination of this issue depends upon the Court's ruling on a narrow legal issue. This narrow legal issue grows out of the following facts: It is an uncontradicted fact in this case that the Clayton Act does not contain an express grant of subpoena power to the Federal Trade Commission. The Hearing Examiner, the Federal Trade Commission, the District Court of the United States for the District of Maryland, and the United States Court of Appeals for the Fourth Circuit, all held that the Clayton Act contained no such express grant of power. In order to hold that the Federal Trade Commission had the power to issue subpoenas in Clayton Act cases, it was necessary to find this power in some other Act, and then transfer this power from the other Act to the Clayton Act. Each Court and agency which passed on this question found this power in

the Federal Trade Commission Act, a separate and distinct Act from the Clayton Act. Under the guise of *"pari materia"*, each Court and Agency which passed on this question transferred this power granted the Commission in the Federal Trade Commission Act, to the Commission in proceedings under the Clayton Act. Each Court and Agency which considered this matter first made a transfer of power from the Federal Trade Commission Act, to the Clayton Act, and then added this transferred power to the Clayton Act. Thus the narrow legal issue in this case is whether such a transfer of power under the guise of "pari materia" is reversible error. This issue might be expressed as follows:

> Can a Court, under the guise of statutory construction, legislate a grant of power to an administrative agency when the Act defining the activity and powers of the Agency contains no such grant of power. Specifically under the doctrine of "pari materia", can the Court grant to the Federal Trade Commission a power which it has under the Federal Trade Commission Act but which it does not have under the Clayton Act as Amended by the Robinson-Patman Act? Furthermore — can a Court make this transfer of power from the Federal Trade Commission Act to the Clayton Act when the Federal Trade Commission Act by its expressed terms limits this power to the Federal Trade Commission Act?

STATUTES INVOLVED

1. *The Federal Trade Commission Act* — enacted September 26, 1914 (38 Stat. 171; 15 U. S. C. 41). It empowered the Commission to hold hearings and subpoena books and records, etc. of a corporation charged with a violation of the Act, as set forth in Sections 5 and 9 of the Act.

2. *The Clayton Act* — enacted October 15, 1914 (38 Stat. 730; 15 U. S. C. 12). It empowered the Commission to hold hearings as set forth in Section 11 of the Act. It did not contain a grant of subpoena power to the Commission.

3. *Robinson-Patman Act* — enacted June 19, 1936 (49 Stat. 1526; 15 U. S. C. Sections 13-14-18-19). It amended the Clayton Act. It did not change or modify the power of the Federal Trade Commission under the Federal Trade Commission Act or under the Clayton Act.

STATEMENT OF THE CASE

In November, 1955 the Federal Trade Commission instituted three separate proceedings under Section 11 of the Clayton Act, U. S. C. Title 15, Sec. 21, against Crosse & Blackwell Company, McCormick & Company, Inc., and Pompeian Olive Oil Corporation, charging each corporation with a violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, U. S. C. Title 15, Sec. 13 (5).* Each Corporation filed an answer denying that it had violated the Clayton Act as alleged, and interposed certain affirmative defenses (19).

Before the answers were filed, a subpoena was issued in each case and served upon the President of each Corporation, directing him to appear before the Hearing Examiner, to testify at the instance of the Commission, and to bring with him and produce certain corporate books, records, accounts, invoices, and other documents.

The President of each Corporation (being the Petitioners in this Petition for Writ of Certiorari) filed a motion to quash the issuance of the subpoena, alleging that the Federal Trade Commission had no subpoena power under the

* Figures in (....) refer to Printed Appendix.

Clayton Act to compel the production of corporate documents, books and records, etc. The Examiner denied the motion; the Petitioners applied to the Federal Trade Commission and the Federal Trade Commission denied the motion.

Thereafter in March, 1956, after the return of the subpoenas, hearings were convened in each case at Baltimore, Maryland. Officials of each Corporation, in charge of the corporate records described in the subpoenas, appeared as the representative of each Corporation and its President (16). Upon the advice of counsel, each official respectfully declined to produce the records demanded by the subpoenas; but did not refuse to testify (20). The Commission's Attorney advised the Examiner in each case that he could not proceed without these records. The Examiner adjourned the hearings.

On March 29th, 1956 the Commission filed in the District Court of the United States for the District of Maryland in each case an application for an order under Section 9 of the Federal Trade Commission Act (U. S. C. Title 15, Sec. 49), requiring the Petitioners to appear before a Hearing Examiner, and to produce the records described in the subpoenas, or to show cause why they should not be produced (14). The Petitioners filed an answer denying that the Federal Trade Commission had the power under the Clayton Act to compel the production of corporate books, and records.

The matter came on for a hearing before the District Court of the United States for the District of Maryland at Baltimore, which Court, on September 11, 1956, filed an Opinion, and entered an Order, granting the application of the Commission and requiring the giving of testimony and the production of the documentary records described in the subpoenas (27). On appeal to the Circuit Court of

Appeals for the Fourth Circuit, the decision of the District Court was affirmed.

REASONS FOR GRANTING THE WRIT

The petition should be granted in this case because—

1. A Federal question of the utmost importance is the sole issue in this case. This question has never been decided by the Supreme Court of the United States. This question is inherent in practically every administrative proceeding of the Federal Trade Commission in the enforcement of the Clayton Act as amended by the Robinson-Patman Act wherein the sole issue is an alleged violation of this Act. The issue must be definitively and finally determined to prevent chaos in Robinson-Patman proceedings before the Commission, and to provide an orderly procedure in such cases.

2. The determination of this question is as important to the Government as it is to parties charged by the Government with a violation of the Clayton Act as amended by the Robinson-Patman Act. Until it is finally and definitively determined, neither the Government, the Commission, nor the parties cited before the Commission for an alleged violation of the Clayton Act as amended by the Robinson-Patman Act, can know how to proceed with respect to the production of books and records in Clayton Act proceedings.

3. The issue must be determined — if not by the Supreme Court, then by Congress. Some time after this case was argued in the United States Court of Appeals for the Fourth Circuit, there was introduced Senate Bill 1023 in the Eighty-Fifth Congress, First Session. This Bill would determine, by an Act of

Congress, the exact issue in this case, by granting the power to the Commission, which the Commission exercised in this case. A copy of this Bill is attached to this petition.* This Bill emphasizes the extreme confusion surrounding this question. Such a situation requires clarification, and until finally clarified, can only result in continuous litigation and delay.

4. There is a direct conflict in the District Courts with reference to the question involved in this case. Compare *Federal Trade Commission v. Menzies,* 145 F. Supp. 164, with *Federal Trade Commission v. Rubin,* 145 F. Supp. 171.

There are at present two cases on appeal to Circuit Courts of Appeals involving this question, as evidenced by *Federal Trade Commission v. Rubin, et al.,* 145 F. Supp. 171, and *Federal Trade Commission v. Reed, et al.,* D. C. N. D. Ill. E. D. Docket 56c-843. Neither of these appeals as of this date have been decided. There is one appeal involving this general question before the Federal Trade Commission — *The Vendo Case,* F. T. C. Docket No. 6646.

5. The Federal Trade Commission has recently under Pre-Merger Notification Bill, H. R. 9424, undertaken an examination and investigation of proposed corporate mergers and their economic effects upon the economy of the Nation. The matter is under intensive study by the Commission. The power of the Commission to subpoena corporate books and records is a most essential question involved in this entire matter. Until this question is determined, there will be continuous litigation to determine the right and power of the Commission to investigate corporate mergers.

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* See Appendix B this Brief.

6. The question is one of great public importance, as evidenced by the number of cases now pending; Senate Bill 1023 and H. R. 9424 Congress, the inquiries received for briefs and records in this case; the requests from Law Schools such as the Harvard Law Review, the Fordham Law School and New York University Law School.

ARGUMENT

THE FEDERAL TRADE COMMISSION DOES NOT HAVE THE POWER UNDER THE FEDERAL TRADE COMMISSION ACT TO REQUIRE A RESPONDENT CORPORATION TO PRODUCE ITS RECORDS IN AN ADMINISTATIVE PROCEEDING INSTITUTED AGAINST SAID CORPORATION UNDER THE CLAYTON ACT, BECAUSE

NO SUCH POWER IS GRANTED TO THE COMMISSION IN THE CLAYTON ACT; AND

THE POWER OF SUBPOENA GRANTED TO THE COMMISSION IN THE FEDERAL TRADE COMMISSION ACT IS EXPRESSLY LIMITED TO THE PURPOSES OF THAT ACT.

The Clayton Act contains no Grant of Subpoena Power to the Federal Trade Commission.

An examination of the Clayton Act immediately discloses that this Act contains no express grant of subpoena power to the Federal Trade Commission. Section 11 of the Clayton Act (U. S. C. Title 15, Sec. 21) grants the Commission the power to hold hearings; defines the power of the Commission with respect to such hearings, but contains no grant of subpoena power. This is recognized by the Federal Trade Commission. In its Opinion, it stated:

> (12) "It is not controlling, however, that the Commission was not expressly empowered under the Clayton Act to issue subpoenas in inquiries and proceedings instituted under that Act."

The District Court of the United States for the District of Maryland found that the Federal Trade Commission in Clayton Act proceedings had the power to issue subpoenas *not because the Clayton Act gave the Commission this power, but because the Clayton Act and the Federal Trade Commission Act were, in the opinion of the Court, in pari materia.* This Court stated (29):

> "They (Clayton Act and Federal Trade Commission Act) are in *pari materia* and should be construed together."

The United States Court of Appeals for the Fourth Circuit merely approved the above holding of the District Court of the United States for the District of Maryland, also finding that the two Acts were in *pari materia.*

A Bill recently introduced in Congress specifically recognizes that the Clayton Act does not contain subpoena powers. There was recently introduced into Congress Senate Bill 1023. The purpose of this Bill was as set forth in the Bill itself:

> "To clarify the powers granted the Federal Trade Commission by Section 9 of the Federal Trade Commission Act to compel the production of documentary evidence."

By this Bill, Congress would grant to the Commission the power which the Commission never had, but attempted to exercise, in this case.

Thus it is clear that the Clayton Act contains no grant of subpoena power, and that this fact was not only recognized by the Courts and Agency which passed on this question, but also by pending legislation in The Congress of the United States. The subpoena power if it is to be given to the Commission in Clayton Act cases, must be found in some other Act. This power is in the Federal Trade Commission Act. Under the guise of Statutes *in pari materia,* this power was transferred from the Federal Trade Com-

mission Act to the Clayton Act, a remarkable act of legal prestidigitation.

It is obvious that this transfer of power from the Federal Trade Commission Act to the Clayton Act by an act of statutory construction is judicial legislation, unless the Federal Trade Commission Act authorizes such a transfer.

Is this grant of power in the Federal Trade Commission Act limited to the purposes of that Act or is it intended to apply to other Acts? What was the Congressional intent as set forth in the language of the Act, and how has this intent been manifested over the years? An examination of the Federal Trade Commission Act, as well as the Clayton Act itself, conclusively shows that the subpoena power in the Federal Trade Commission Act is limited to that Act and no other Act.

Introduction to Acts — The Clayton Act and the Federal Trade Commission Act are separate and distinct acts. Each Act contains its own sanctions. Each Act is a unified complete Act in itself.

The Federal Trade Commission Act — This Act is broad and regulatory. It empowers the Commission to gather and compile information concerning the organization, businesses, conducts, practices and the management of corporations engaged in commerce, subject to certain exceptions. The Commission is empowered to require such corporations to furnish information and file annual and special reports. Under certain circumstances, the Commission is authorized to investigate and report facts relating to any alleged violation of anti-trust laws; to investigate for the Attorney General, or on the Commission's own initiative, the manner in which anti-trust decrees against corporations are being carried out; and further upon application of the Attorney General to recommend readjustments of business corporations alleged to be in violation of the anti-trust acts.

The Commission is further empowered to investigate from time to time trade conditions in and with foreign countries where associations, combinations or practices of manufacturers or traders may affect the foreign trade of the United States, and to make reports thereon to Congress with its recommendations.

Under the Wheeler-Lea amendments, there is conferred on the Commission special authority for the control of false advertising of foods, drugs, cosmetics and curative or corrective devices.

The Commission is also empowered to administer and enforce the provisions of the following Acts:

Webb-Pomerene Export Act — U. S. C. Title 15, Sec. 61, etc.;
The Wool Products Labeling Act — U. S. C. Title 15, Sec. 68, etc.;
The Fur Products Labeling Act — U. S. C. Title 15, Sec. 69, etc.;
Flammable Fabrics Act — U. S. C. Title 15, Sec. 1191, etc.

In order that the Commission may fulfill these many executive, regulatory, legal and administrative duties, Congress granted to the Commission the right of subpoenas. Section 9 of the Federal Trade Commission Act, U. S. C. Title 15, Sec. 49, provides:

> "That for the purpose of this Act, the Commission . . . shall have power to require by subpoena . . . the production of all such documentary evidence relating to any matter under investigation".

The Clayton Act — This Act as amended by the Robinson-Putnam Act, is limited in its scope. The procedure for judicial review and enforcement of the Commission's cease-and-desist orders under this Act is entirely different from such procedure under the Federal Trade Commission Act.

The Clayton Act primarily contains specific prohibitions against defined discriminatory merchandising practices. To enforce and police its limited field, no power of subpoena was given to the Commission. It may be assumed that Congress believed no such power was necessary.

The Federal Trade Commission is purely a statutory body and possesses only such powers as are granted by the Statute. Since it admittedly was not granted the power to issue subpoenas, it follows that it does not have the power.

The Power of Subpoena granted to the Commission in the Federal Trade Commission Act is Expressly Limited to the Purpose of that Act.

Section 9 of the Federal Trade Commission Act (U. S. C. Title 15, Sec. 49) is the only authority under which the Commission may issue a subpoena. This grant of subpoena power was strictly limited by Congress in clear and unambiguous language to the Federal Trade Commission Act. Section 9 specifically limits this power to the purposes of this Act. It is limited to proceedings under the Act. Section 9 contains this specific limitation at the beginning of the Section:

> *"That for the purposes of this Act* the Commission . . . shall at all reasonable times have access to . . . any documentary evidence of any corporation being investigated or proceeded against and the Commission shall have power to require by subpoena . . . the production of all such documentary evidence relating to any matters under investigation." (Emphasis supplied.)

This limitation is specifically set forth in other sections of the Act. The fourth paragraph of Section 9 provides:

> "Upon the application of the Attorney General of the United States . . . the District Courts of the United States shall have jurisdiction to issue writs of man-

damus compelling any person or corporation to comply *with the provisions of this Act or any order of the Commission made in pursuance thereof.*" (Emphasis supplied.)

The fifth paragraph of Section 9 provides:

"The Commission may order testimony to be taken by deposition in any proceeding or investigation pending *under this Act* at any stage of such proceedings or investigation". (Emphasis supplied.)

This limitation is recognized in the codification of the Federal Trade Commission Act in the United States Code. The United States Code, Title 15, Section 49, provides:

"For the purposes of Sections 41-46 and 47-58 of this Title, the Commission . . . shall have power to require by subpoena . . . the production of all such documentary evidence . . ." (Emphasis supplied.)

The words "For the purposes of this Act" in Section 9 of the Federal Trade Commission Act, and the words "For the purposes of Sections 41-46 and 47-58 of this Title" are clear and unambiguous; they limit the subpoena power of the Commission to the purposes of the Act. For an analogous case see:

Harriman v. Interstate Commerce Commission, 211 U. S. 407.

Commission's Interpretation — To accept the Commission's contention that the subpoena power of the Commission in Section 9 of the Federal Trade Commission Act, can be extended by the Commission to administrative proceedings under the Clayton Act, is to ignore and reject the express language of the Act itself. The Commission is forced to take the position: (a) that when The Congress said "For the purposes of this (Federal Trade Commission) Act", in Section 9 of the Federal Trade Commission Act, The Congress meant "for the purposes of this (Federal Trade Com-

mission) Act and the Clayton Act"; (b) that when The Congress codified the Federal Trade Commission Act in the United States Code as Sections 41-46 and 47-58 of Title 15 and expressly limited the subpoena power of the Commission in Section 9 by the words "For the purposes of sections 41-46 and 47-58 of this Title", that The Congress was mistaken and meant to say "For the purposes of sections 41-46 and 47-58 and of sections 13, 14, 18 and 19 (sections 2, 3, 7 and 8 of the Robinson-Patman Act) of this title".

Congressional Interpretation — If in fact Section 9 of the Federal Trade Commission Act embodied a general grant of the subpoena power to the Commission, despite the express limitation appearing at the very outset of the section, there would be no need for The Congress to make specific provisions for the grant of subpoena power when conferring additional enforcement responsibilities upon the Commission. However, such has been the consistent and regular practice of Congress where it desired and intended to extend the subpoena power of the Commission from purposes of the Federal Trade Commission Act to purposes of other Acts to be administered by the Commission.

Thus, in Section 5 of the Webb-Pomerene Export Trade Act of 1918, U. S. C. Title 15, Sec. 65, The Congress provided:

> "For the purpose of enforcing these provisions the Federal Trade Commission shall have all the powers, so far as applicable, given it in the Federal Trade Commission Act."

Section 6(a) of the Wool Products Labeling Act of 1939, U. S. C. Title 15, Sec. 68d(a), explicitly provides:

> "Except as otherwise specifically provided herein, this Act (Sections 68-68j of this title) shall be enforced by the Federal Trade Commission under rules, regulations,

and procedure provided for in the Federal Trade Commission Act.

"The Commission is authorized and directed to prevent any person from violating the provisions of this Act (Sections 68-68j of this title) in the same manner, by the same means, and with the same jurisdiction, powers, and duties, as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this Act. . . ."

The same incorporation of powers is made in Section 8(a) (1) and (2) of the Fur Products Labeling Act of 1951, U. S. C. Title 15, Sec. 69f(a) (1) and (2), and in Section 5(a) and (b) of the Flammable Fabrics Act, U. S. C. Title 15, Sec. 1194(a) and (b).

In addition to the above Statutes which clearly express the Congressional intent, this intent is emphatically set forth in Senate Bill 1023, introduced into the 86th Congress, First Session, on February 4, 1957 and referred to the Committee on Interstate and Foreign Commerce. This Bill, among other things, provides:

"9. For the purposes of this Act and for the purposes of any proceedings or investigations of the Commission under *Section 11* of the Act entitled 'An Act to supplement existing laws against unlawful restraint and monopoly' . . . the Commission . . . shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." (Emphasis supplied.)

Where the Language of a Statute is plain and unambiguous, there is no occasion for construction, and the Statute must be given Effect according to its plain and obvious meaning. It cannot be given some other meaning under the Doctrine of "pari materia".

The Federal Trade Commission asks this Court to read into the Clayton Act a power not given in the Act. In considering just this kind of an argument, Mr. Justice Frankfurter, in *Columbia Law Review*, May, 1947, Vol. 47, No. 4, page 533, stated:

> "A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making wisely suggest, construction must eschew interpolation and evisceration. *He must not read in by way of creation.*" (Emphasis supplied.)

At page 534 of the same Article, Mr. Justice Frankfurter quotes with approval from *Iselin v. U. S.*, 270 U. S. 245, at 250, 251:

> "What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope."

It requires no citation of authority to establish the rule that where the language of a statute is plain and unambiguous, there is no occasion for construction. As stated by Mr. Chief Justice Vinson, in considering this problem in connection with Section 1404(a) of Revised Title 28 of the U. S. Code, Judiciary and Judicial Proceedings, in *"Ex-Parte Collett"*, 337 U. S. 55, 93 L. Ed. 1207 at 1211:

> "Third. Petitioner's chief argument proceeds not from one side or the other of the literal boundaries of par. 1404(a), but from its legislative history. The short answer is that there is no need to refer to the legislative history where the statutory language is clear."

In considering this same question in connection with the National Labor Relations Board, Mr. Justice Jackson, in the case of *Packard Motor Company v. National Lab. Rel. Bd.*, 330 U. S. 485, 91 L. Ed. 1040 at 1050, said:

> "We are invited to make a lengthy examination of views expressed in Congress while this and later legislation was pending to show that exclusion of foremen was intended. There is, however, no ambiguity in this Act to be clarified by resort to legislative history, either of the Act itself or of subsequent legislative proposals which failed to become law."

See cases collected: 82 *C. J. S. Statutes*, par. 322, p. 577.

Since the Act is clear and unambiguous, it must be given its clear and unambiguous meaning.

The Doctrine of Pari Materia cannot give the Federal Trade Commission the Power to Issue a Subpoena which the Act itself does not give to the Commission.

The statutory limitations of the subpoena power of the Commission in Section 9 of Federal Trade Commission Act is explicit and clearly defined. The words "for the purpose of this Act" are clear and unambiguous. As set forth above, there is nothing which requires any construction.

Apart from any other considerations, the doctrine of *pari materia* can never be used to supply a specific provision omitted from an Act, or to restrict a limitation contained in another Act. As stated in 82 *C. J. S. Statutes*, par. 366, p. 814:

> "In other words, the rule of construction may not be applied to narrow the compass of one statute by reference to another non-conflicting and non-repealing act, and restrictions placed on a power in one instance cannot be extended to another case for which they were not intended and for which another provision was made."

Thus, in the present case, a power contained in the Federal Trade Commission Act cannot be added to the Clayton Act by a doctrine of statutory construction.

The doctrine of *pari materia* was never intended to usurp the power vested in Congress by giving Courts the power to construe powers or provisions in Acts, which Acts do not contain such powers or provisions. The power of legislation is vested in Congress, not Courts under the guise of *pari materia*.

In this instance, to do so is to give a statutory agency a power never conferred by Congress. It is to violate the doctrine that a statutory agency is a creature of Congress, and can only have the power granted by Congress. If the subpoena power is grafted into the Clayton Act, what other powers may be taken from the Federal Trade Commission Act and grafted into the Clayton Act? The Commission has made one attempt to read enforcement proceedings under the Federal Trade Commission Act into the Clayton Act. This attempt failed.

> *F. T. C. v. Rubberoid*, 343 U. S. 470, 96 L. Ed. 1081.

In both the Clayton Act and the Federal Trade Commission Act, there are specific provisions for the enforcement of each Act. There are sanctions contained in the Clayton Act which are not contained in the Federal Trade Commission Act. Each Act is a complete Act in itself. The doctrine of *pari materia* does not apply, and was never intended to apply, to the construction of an Act which is complete in itself.

> *F. T. C. v. Rubberoid Co.*, 343 U. S. 470, 96 L. Ed. 1081;
> *McComb v. McKay*, 164 F. (2d) 40;
> 82 *C. J. S. Statutes*, par. 366, page 814 — Note 4.

The statutes are different; each statute is complete in itself; the statutes are clear and require no construction, and the doctrine of *pari materia* cannot be used to supply something in one statute which is not found in the other. It is submitted the doctrine of *pari materia* has no application in this case.

Legislative History

If consideration is to be given the Congressional history surrounding the enactment of the Federal Trade Commission Act, it only serves to confirm the plain and unambiguous language of the statute, and the limitation placed by Section 9 of the Act on the subpoena power of the Federal Trade Commission.

The limitation contained in the words "For the purposes of this Act" was no legislative inadvertence. In the Congressional consideration of this very provision of the Act, there was a specific rejection of an attempt to grant broad and unlimited subpoena powers to the Federal Trade Commission. The Bill to create the Federal Trade Commission as reported out by the House Interstate and Foreign Commerce Committee on April 14, 1914, House Report No. 533, provided:

> "Sec. 16. *That for the purposes of this Act,* and in aid of its powers of investigation herein granted, the commission shall have and exercise the same powers conferred upon the Interstate Commerce Commission in the Acts to regulate commerce to subpoena and compel the attendance and testimony of witnesses . . ." (Emphasis supplied.)

The Senate substitute for this Bill, Senate Report No. 597, June 13, 1914, adopted August 5, 1914, eliminated the qualification "for the purposes of this Act" and provided:

"Sec. 8. The Commission shall have and exercise the powers possessed by the Interstate Commerce Commission to subpoena and compel the attendance and testimony of witnesses . . ."

The final version of Section 9 as it came out of Conference restored the initial limitation, restricting the subpoena power to the purposes of the Federal Trade Commission Act. House Conf. Report No. 1142, September 4, 1914. This action was taken at the very time that Congress was considering the Clayton Act.

Thus the statutory history of the Act confirms the express wording of the Act.

Section 11 of the Clayton Act Details how the Authority vested in the Commission shall be Exercised under the Clayton Act — it does not grant the Commission Power to Issue Subpoenas under the Clayton Act.

The Clayton Act, U. S. C. Title 15, Section 12, etc. was enacted in 1914 to supplement the existing anti-trust laws. In 1936 it was amended by the Robinson-Patman Act.

Section 11 of the Clayton Act, U. S. C. Title 15, Section 21, provides the administrative machinery for the enforcement of the Act. This section grants authority to enforce Compliance with the Act to

(1) the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Commission Act, as amended;

(2) the Federal Communications Commission where applicable to common carrier engaged in wire or radio communication or radio transmission of energy;

(3) the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938;

(4) the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and

(5) the Federal Trade Commission where applicable to all other character of commerce.

Section 11 sets out in meticulous detail how the authority vested in the above administrative agencies is "to be exercised". It provides the exact power and authority of the Commission in enforcement proceedings for alleged violations of Sections 2, 3, 7 and 8 of the Clayton Act, as amended by the Robinson-Patman Act. There is not one word in Section 11 or in any section of the Clayton Act authorizing the Federal Trade Commission, by subpoena or otherwise, to require a respondent corporation to produce its records in administrative proceedings against a corporation for an alleged violation of the Clayton Act. If it was intended that the Commission should have subpoena power in the Clayton Act, then this power would have been set forth in this carefully drafted Section, setting up the power of the Commission in the Clayton Act.

The deliberate omission of Congress to grant subpoena power to the Federal Trade Commission in administrative proceedings under Section 11 is strikingly exemplified when it is noted that in Sections 13 and 15 of the Clayton Act, U. S. C. Title 15, Sections 23 and 25, the use of subpoenas is expressly authorized in the enforcement of special sanctions in certain court proceedings. There is not even an implied grant of subpoena power in the Clayton Act in administrative proceedings.

Section 11 of the Clayton Act, in its last paragraph, provides the methods by which service of complaints, notices,

orders petitions, applications and other papers in an administrative proceeding under this section may be served upon parties charged with a violation of Sections 2, 3, 7 and 8. This paragraph provides:

> "Complaints, orders and other processes of the Commission or Board *under this section* may be served by anyone duly authorized by the Commission or Board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary or other executive officer or a director of the Corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process registered and mailed as aforesaid, shall be proof of the service of same." (Emphasis supplied.)

It is clear that this paragraph does not confer the subpoena power upon the Federal Trade Commission, and has no reference whatsoever to the subpoena power, but merely describes the mechanics of serving the papers authorized by the preceding paragraphs of Section 11.

It is only the complaints, orders and other processes "under this section" which may be so served. Nowhere in Section 11 or in any other sections of the Clayton Act as amended by the Robinson-Patman Act is the subpoena power granted to the Commission. This section merely provides for service of process, it provides no grant of power.

The complete lack of substance in any claim that the subpoena power is to be found by inference in the words

"other processes" in the last paragraph of Section 11 is self evident when consideration is given to the fact that virtually the identical language is contained in subsection (f) of Section 5 of the Federal Trade Commission Act, U. S. C. Title 15, Sec. 45 (f).

Subsection (f) of Section 5 of the Federal Trade Commission Act provides:

> "Complaints, orders and *other processes* of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or principal office or place of business of such person, partnership, or corporation; to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same." (Emphasis supplied.)

This subsection clearly relates to the method of service of the complaints, notices, orders, petitions, applications and other papers referred to in Section 5 of the Federal Trade Commission Act in an administrative proceeding under Section 5 of said Act. The subsection has no reference whatsoever to the subpoena power. It is obvious that it does not grant the subpoena power to the Federal Trade Commission in administrative proceedings under the Federal Trade Commission Act any more than the last paragraph of Section 11 does in administrative proceeding under the Clayton Act.

Section 9 of the Federal Trade Commission Act specifically granted the Commission the subpoena power under that Act. If subsection 5 (f), by the use of the words "other processes" in this same Act grants the Commission the power to issue a subpoena, then the carefully granted power contained in Section 9 is utterly meaningless.

The lack of any grant of subpoena power to the Federal Reserve Board, which is one of the five (5) administrative agencies named in Section 11, was specifically commented upon at page 422 of the Final Report of the Attorney General's Committee on Administrative Procedure (1941). See also *Transamerica Corporation v. Board of Governors of the Federal Reserve System,* 3rd Cir. 1953, 206 F. 2d 163 at 170, cert. den. 346 U. S. 901 (1954).

As stated in the Final Report of the Attorney General's Committee on Administrative Procedure at pages 414-5 "not all administrative agencies have been given all of these (visitorial and subpoena) powers; *indeed, some agencies have been given none at all*". (Emphasis supplied.)

In addition to the Federal Reserve Board (see part 9, Monograph of Attorney General's Committee on Administrative Procedure), there are a number of administrative agencies which are authorized by Congress to conduct administrative proceedings, but do not have the subpoena power, although such proceedings include complaints hearings, and adjudications, that are similar to the administrative proceedings conducted by the Federal Trade Commission under Section 11 of the Clayton Act. Among these are the Post Office Department which conducts administrative fraud order proceedings that include complaints, hearings, and adjudications that may deprive persons, partnerships, and corporations of the use of the mails, and the Civil Service Commission which conducts administrative

proceedings that adjudicate the rights of Government employees.

In *Deviny, etc. v. Campbell*, D. C. Cir. 1952, 194 F. 2d 876, cert. den. 344 U. S. 829 (1952), which involved an administrative proceeding by the Civil Service Commission adjudicating the rights of a Government employee, the Court of Appeals for the District of Columbia held that the Civil Service Commission does not have the subpoena power and that it has no power to issue subpoenas where such power is not conferred by a statute.

In the companion case of *Federal Trade Commission v. William B. Rubin, President, The Sweets Company of America, Inc.* and The Sweets Company of America, Inc., a corporation, No. M 18-304, decided August 17, 1956, by the United States District Court for the Southern District of New York, 145 F. Supp. 171 and involving the same legal question, District Judge Dimock in part stated:

> "It will be noted that both section 5 of the Federal Trade Commission Act and section 11 of the Clayton Act refer to the service of '(c) complaints, orders, and other processes . . . under this section'. In each statute 'this section' refers to a section prescribing the procedure for the institution and prosecution of complaints. Neither section refers to the subpoena power and, indeed, the subpoena power is not conferred or referred to at all by the Federal Trade Commission Act until the later section 9. In each statute 'this section' dealt with a notice in addition to a complaint and order. The provision for service might well have described the papers as 'complaints, orders or notices . . . under this section' but the more generic term 'processes' was used out of an abundance of caution. Since the section had nothing to do with subpoenas and the word 'processes' serves a function without treating it as referring to subpoenas, I cannot bring myself to say that they are included in the expression 'processes . . .

under this section'. I hold, therefore, that the Clayton Act did not confer the subpoena power on the commissions and board which it authorized to enforce the Act. I reach this conclusion with great reluctance. I cannot help feeling that the omission of the subpoena power section from the Clayton Act was a mere inadvertence, and, were I able to find any internal evidence to support that feeling, I would treat that evidence as an implication of the power. A decent respect for the separation of the spheres of the judiciary and the legislative prohibits me, however, from presuming that something that I would have included in a statute was inadvertently omitted by Congress and then supplying the omitted matter."

* * * * * *

". . . It is hard to conceive of a congressional policy which would withhold the subpoena power from the Federal Reserve Board where the Act was being enforced against banks but bestow it upon the Federal Trade Commission where the Act was being enforced against other non-carrier corporations. Yet that would be the result of holding that the subpoena power in Clayton Act cases was conferred on the Federal Trade Commission by the Federal Trade Commission Act. No statute has ever conferred the subpoena power on the Federal Reserve Board. Thus the Federal Trade Commission could use subpoenas in Clayton Act cases but the Federal Reserve Board could not.

"In arguing that the Federal Trade Commission's subpoena power granted by the Federal Trade Commission Act may be used by it in the enforcement of the Clayton Act, petitioner uses as a makeweight the word 'processes' which I have just discussed. It is claimed that this word includes 'subpoenas' and thus indicates that Congress contemplated that the commissions and board which would enforce the Clayton Act would use in doing so such subpoena power as was granted them by other acts. As just indicated, I cannot bring myself to believe that the word 'processes'

as used in the Clayton Act includes subpoenas so I cannot allow it influence, even as a makeweight, in supporting petitioner's contention that the Federal Trade Commission Act empowers the Federal Trade Commission to use subpoenas in the enforcement of the Clayton Act."

It should be noted that the District Court for the Southern District of New York and the District of Maryland, in deciding the same identical issue, arrived at exactly opposite conclusions.

Section 6(c) of the Administrative Procedure Act does not Supply the Lack of Power since Section 6(c) is Limited to Agencies that are authorized by law to issue Subpoenas, and the Commission has no Power to Issue a Subpoena under the Clayton Act.

The Administrative Procedure Act does not expand the subpoena power of the Federal Trade Commission beyond that conferred by Section 9 of the Federal Trade Commission Act. The Administrative Procedure Act provides:

Section 6 (c), U. S. C., Title 5, Sec. 1005 (c) provides:

"Agency subpoenas authorized by law shall be issued to any party upon request . . ."

Section 7 (c) U. S. C., Title 5, Sec. 1006 (b) provides:

"Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to . . . issue subpoenas *authorized by law* . . ." (Emphasis supplied.)

The above sections were to assure private parties the same access to subpoenas as that available to the representatives of the agencies and do not expand the powers of administrative agencies. S. Rep. No. 752, 79th Cong. 1st Sess. and H. Rep. No. 1980, 79th Cong. 2nd Sess. The Ad-

ministrative Procedure Act imposes a limitation and does not contain any sanction for the issuance of subpoenas, unless they are elsewhere authorized by statute.

The Federal Trade Commission is an Administrative Agency and has no common law or inherent power to Issue Subpoenas.

The Federal Trade Commission is an administrative agency and has no common law, or inherent power, to issue a subpoena. It is a creature of Congress and possesses only those powers granted by Congress. As stated by Mr. Justice Reynolds, speaking for the court, in *F. T. C. v. Sinclair Refining Company, et al.*, 261 U. S. 463 at 465:

> "The powers of the Commission are limited by the Statute."

This same doctrine is repeated almost verbatim in *Arrow-Hart and Hegeman Electric Company v. F. T. C.*, 291 U. S. 587 at 598, wherein Mr. Justice Roberts, speaking for the Court said:

> "The Commission is an administrative body possessing only such powers as are granted by the Statute."

This proposition, as such, is not subject to dispute, the Court's attention is directed to only a few further authorities:

Humphrey's Executor v. U. S., 295 U. S. 602 at 628;
F. T. C. v. Raladam Co., 283 U. S. 643 at 649;
Eastman Kodak Co. v. F. T. C., 7 F. (2) 994, affirmed 274 U. S. 619;
National Harness Mfrs. Asso. v. F. T. C., 268 F. 705 at 707;
Chamber of Commerce of Minneapolis v. F. T. C., 280 F. 45 at 48;
Marquette Cement Mfg. Co., Inc. v. F. T. C., 147 F. (2) 589 at 594.

The Doctrine of Casus Omissus is Applicable

The omission from the Clayton Act of the subpoena power of the Federal Trade Commission in administrative proceedings under that Act may have been intentional or unintentional on the part of Congress. In either event it is clearly a casus omissus. This fact and this doctrine is clearly set forth in the following cases:

". . . a casus omissus is not unusual, particularly in legislation introducing a new system."

United States v. Weitzel, 246 U. S. 533, 543 (1918).

"When a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe."

Hobbs v. McLean, 117 U. S. 567, 578 (1886).

"The statute was evidently drawn with care. Its language is plain and unambiguous. What the government asks it not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function."

Iselin v. United States, 270 U. S. 245, 250, 251 (1926).

"It is a general rule that the courts may not by construction insert words or phrases in a statute, or supply a casus omissus by giving force and effect to the language of the statute when applied to a subject about which nothing whatever is said, and which, to all appearances, was not in the minds of the legislature at the time of the enactment of the law, however just and desirable it may be to supply the omitted provision.

"In this respect, it has been declared that it is not the office of the court to insert in a statute that which has

been omitted, and that what the legislature omits the courts cannot supply. These rules have been regarded as applicable to an unintentional omission. It is immaterial that the omission was a mere oversight on the part of the legislature and that without doubt the statute would have been drawn otherwise had the attention of the legislature been called to the oversight."

50 Am. Jur. Statutes Sec. 234, p. 221.

See also:

Ebert v. Poston, 266 U. S. 548, 554 (1925);
United States v. Monia, 317 U. S. 424, 430 (1943);
United States v. Great Northern Railway Co., 343 U. S. 562, 575 (1952);
Pirie v. Chicago Title and Trust Co., 182 U. S. 438, 452 (1901).

Long Usage Cannot Grant a Power to the Commission Which the Statute does not give the Commission.

Since it is clear that the Federal Trade Commission does not have subpoena power in a Clayton Act proceeding, long usage (assuming there has been such usage) cannot serve to arrogate to the Commission power it does not otherwise lawfully possess. Unlawful long usage cannot generate subpoena power. In *Brotherhood v. Madden*, 58 F. Supp. 366, 373 (D. Md. 1944) rev'd other grounds, 147 F. 2d 439 (4th Cir. 1945), this Court in part stated:

"(S)uffice it to say that a practice on the part of the Board, no matter how uniformly and long continued, cannot be made a lawful practice unless within the scope and intent of the statute from which, and only from which, the Board derives its powers."

In *United States v. Morton Salt Co.*, 338 U. S. 632, 647 (1950) the Supreme Court in part stated:

"The fact that powers long have been exercised well may call for close scrutiny as to whether they exist;

but if granted, they are not lost by being allowed to lie dormant, *any more than non-existent powers can be prescribed by an unchallenged exercise.*" (Emphasis supplied.)

In *Marquette Cement Mfg. Co. v. Federal Trade Commission*, 147 F. 2d 589, 594 (7th Cir. 1945), the Seventh Circuit in part stated:

"... (administrative agencies) ... are the creatures of Congress and it is not within the province of the Courts either to emasculate or enlarge the powers which it has conferred. Any appeal for relief should be made to Congress rather than to the Courts."

As was incisively stated in *Application of Barnes*, 116 F. Supp. 464, 467:

"The importance to the administration and enforcement of the Act is evident because it would ease the burden of investigations in such situations as here, but such reason of expediency cannot prevail if the subpoena power exercised is in excess of the statutory grant ... The subpoena power must remain within the bounds of the legislative. ..."

The rationale of the Supreme Court in *Cudahy Packing Co. v. Holland*, 315 U. S. 357, 367 (1942), speaking through Chief Justice Stone, in a case concerning the power to delegate the issuance of subpoenas, stated:

"Nor can we assume, as the Government argues, that Congress is wholly without design in withholding the power in this case and granting it in others, or even if it had been, that it is any part of the judicial function to restore to the Act what Congress has taken out of it. Even though Congress has underestimated the burden which it has placed upon the Administrator, which is by no means clear, we think that the legislative record establishes that Congress has withheld from him au-

thority to delegate the exercise of the subpoena power, and that this precludes our restoring it by construction."

And as was stated by the Supreme Court in *Federal Trade Commission v. Rubberoid Co.*, 343 U. S. 470, 479 (1952):

"Effective enforcement of the Clayton Act by the Commission may be handicapped by the present provisions, but that is a question of policy for Congress."

In the companion case of *Federal Trade Commission v. William B. Rubin, President, The Sweets Company of America, Inc., and The Sweets Company of America, Inc., a corporation*, No. M 18-304, decided August 17, 1956 by the United States District Court for the Southern District of New York, supra and involving identically the same legal question, District Judge Dimock in part stated:

"Petitioner makes a plea based on administrative interpretation. It is said that the Federal Trade Commission has issued in Clayton Act cases hundreds and perhaps thousands of subpoenas. That, without more, is insufficient to supply the omission of a grant of the subpoena power in statutory law. See United States v. Morton Salt Co., 338 U. S. 632, 647."

Judge Dimock concluded his opinion with the statement:

"I regret that I am unable to agree with two cases in which the power of the Federal Trade Commission to issue subpoenas in Clayton Act cases has been upheld, F. T. C. v. Reed, D. C. N. D. Ill. E. D., Docket 56 C. 843, June 12, 1956, and F. T. C. v. Menzies, D. C. D. Md., Docket 36, August 30, 1956."

There is no final decision of any Court sustaining the Commission's contention that it has the subpoena power in an administrative proceeding under the Clayton Act.

CONCLUSION

The decision in this case is one of great vital importance — of great importance to both the Government and the public, and it is respectfully prayed that this Court grant the petition for Writ of Certiorari, as herein prayed.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7352.

John T. Menzies, President of The Crosse & Blackwell Company; Charles P. McCormick, President of McCormick & Company, Inc., and Samuel H. Hoffberger, President of Pompeian Olive Oil Corporation,

Appellants,

versus

Federal Trade Commission,

Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.

(Argued January 23, 1957. Decided March 7, 1957.)

Before PARKER, Chief Judge, and HARRY E. WATKINS and GILLIAM, District Judges.

G. C. A. Anderson and James W. Cassedy (A. Adgate Duer; Niles, Barton, Yost & Dankmeyer; Anderson, Barnes & Coe, and Morton J. Hollander on brief) for Appellants, and Robert B. Dawkins, Assistant General Counsel, Federal Trade Commission, (Earl W. Kintner, General Counsel, and John T. Loughlin, Attorney, Federal Trade Commission, on brief) for Appellee.

PARKER, Chief Judge:

These are appeals from an order enforcing subpoenas duces tecum issued by the Federal Trade Commission pur-

suant to section 9 of the Federal Trade Commission Act, 15 USC 49. The subpoenas were issued in proceedings before the Commission in which three corporations were charged with violation of section 2(d) of the Clayton Act as amended by the Robinson-Patman Act. The contentions on appeal are that the subpoenas are invalid on the ground that the Commission does not have power to issue subpoenas under section 9 of the Federal Trade Commission Act in proceedings had before it for enforcement of the Clayton Act and that, even if this power exists, the subpoenas are violative of the provisions of the Fourth Amendment to the Constitution of the United States.

The facts are fully stated and the applicable statutory provisions are accurately set forth and analyzed in the opinion of the District Judge. See *Federal Trade Commission v. Menzies*, 145 F. Supp. 164. We note that like action was taken in the case of Federal Trade Commission against Reed in the Northern District of Illinois, not yet reported, although not followed in *Federal Trade Commission v. Rubin in the Southern District of New York*, 145 F. Supp. 171. With due respect to the opinion of the judge in the case last mentioned, which we have carefully read and considered, we entertain no doubt as to the correctness of decision of the District Judge in this case and feel that little need be added to his opinion.

It is not without significance that for more than forty years the Federal Trade Commission, in proceedings had before it under the Clayton Act, has issued subpoenas such as it issued here and has issued many thousand of such subpoenas. While we agree that this is not conclusive as to its power to issue them, it is not reasonable to suppose that the power would have gone unchallenged for so long a period in such a sensitive field of the law, if there were any real doubts as to its existence.

The Federal Trade Commission Act and the Clayton Act were before Congress at the same time and were in pari materia dealing with the same general subject matter, restraints of trade and unfair competition. The Clayton

Act (38 Stat. 730) laid down substantive rules of law and provided for their enforcement by courts and administrative agencies. The Federal Trade Commission Act created the Commission as an administrative agency and conferred certain powers upon it, among others the power to enter cease and desist orders upon a finding of unfair competition and to conduct investigations as to "the organization, business, conduct, practices and management of any corporation engaged in commerce, excepting banks and common carriers * * * and its relation to other corporations and to individuals, associations and partnerships". 38 Stat. 717-724. Authority to enforce compliance with the provisions of the Clayton Act, except as to banks and common carriers, was conferred by section 11 of that act on the Federal Trade Commission; and this could mean nothing else than that, in carrying out this provision, the Commission should exercise the powers with respect to investigations and hearing vested in it by the act of its creation. Among such powers, was the power to examine documents and witnesses and issue subpoenas. This was provided in section 9 of the Act, the pertinent portion of which is as follows:

> "Sec. 9. That for the purposes of this Act the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence. * * *."

Contention is made that the language "for the purposes of this act" limits the power of examining witnesses and issuing subpoenas to proceedings and investigations authorized by the act creating the Commission and that the power

may not be exercised in an enforcement provision which the Commission is authorized by the Clayton Act to conduct. This, we think, is an unreasonable and forced construction of the language used, the manifest purpose of which was to give the Commission the power of subpoena and examination in connection with any investigation or proceeding which it was authorized by law to conduct. The language in question is "for the purposes of this act;" and one of the purposes of the act was to vest the Commission with adequate powers to conduct investigations and proceedings with respect to restraints of trade and unfair competition. When duties of investigation or enforcement are imposed upon the Commission by another act or acts, the reasonable intendment is that it shall exercise the power conferred upon it by law in the discharge of such duties. As was well said in the opinion of the Commission:

> "The Federal Trade Commission Act and the Clayton Act were enacted as remedial measures designed to correct apparent deficiencies in the Sherman Act through administrative proceedings. They are statutes in pari materia which were enacted in the same session of Congress and, therefore, are to be construed together so as to reinforce their common leglislative purpose.
>
> "The Federal Trade Commission was designated as a major agency for enforcement of sections 2, 3, 7 and 8 of the Clayton Act. That designation necessarily implied that the Commission was to be aided in the effective discharge of its duties in adversary proceedings by the compulsory processes which were being made available to it under its organic act. That Congress thus intended is clear because section 11 of the Clayton Act provides for quasi-judicial hearings culminating in findings as to the facts and orders, including orders to cease and desist, and, without the power to compel the production of evidence in the course of proceedings thereunder, the danger of improvident orders lacking bases in fact would be great. We hold, therefore, that there is sound legal basis for the issuance and enforce-

ment of the Commission's processes requiring the production of appropriate information in Clayton Act inquiries and adjudicative proceedings."

It is conceded that if the Commission were conducting an investigation under section 5 or section 6 of the Trade Commission Act into the discriminatory practices of the corporations here being investigated, it would have power to issue subpoenas under section 9 of the Act and to use the information thus obtained in a subsequent proceeding to enforce the provisions of the Clayton Act. Certainly the power of the Commission to issue subpoenas and conduct the investigation is not less because of the fact that it gives notice in advance that the information obtained is to be so used; and the filing of the complaint under the Clayton Act amounts to no more than this. To deny such power to the Commission would in large measure defeat the purpose which Congress manifestly had in mind in the enactment of these statutes; and we find nothing in the language or history of either statute which at this late day requires such a result.

The contention that the subpoenas authorize searches and seizures violative of the Fourth Amendment is so lacking in merit as not to warrant discussion. See *United States v. United States District Court for the Southern District of West Virginia*, 4 Cir. 238 F. 2d 713; *Oklahoma Press Co. v. Walling*, 327 U. S. 186, 202-211; *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501, 510. As said in the case last cited:

> "The subpoena power delegated by the statute as here exercised is so clearly within the limits of Congressional authority that it is not necessary to discuss the constitutional questions urged by the petitioner, and on the record before us the cases on which it relies are inapplicable and do not require consideration."

The subpoenas did not violate the rule of reasonableness laid down in *Hale v. Henkel*, 201 U. S. 43. They ask for records containing information clearly relevant to the

charges being investigated and describe the records as accurately as they could be described under the circumstances. The order of the court below directed that none of the records be made public unless and until received in evidence and that documents containing trade secrets be placed in a confidential file in accordance with the practice followed by the Commission in such cases. There was further provision for the examination of records in the offices of the corporations being investigated and for the production before the Commission of only such as were material to the matter under inquiry.

The orders appealed from will accordingly be affirmed, and, in order that there may be no more delay than necessary in the proceedings before the Commission, mandate will issue twenty days after entry of the judgment of this court and will not be further stayed unless the appellants shall in the meantime have filed applications with the Supreme Court of the United States for writ of certiorari to review the judgment.

Affirmed.

APPENDIX B

85TH CONGRESS
1ST SESSION

S. 1023

IN THE SENATE OF THE UNITED STATES

February 4, 1957

Mr. Bricker (by request) introduced the following bill; which was read twice and referred to the Committee on Interstate and Foreign Commerce

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A BILL

To clarify the powers granted to the Federal Trade Commission by section 9 of the Federal Trade Commission Act to compel the production of documentary evidence.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first paragraph of section 9 of the Federal Trade Commission Act (15 U. S. C. 49) is amended to read as follows:

"SEC. 9. For the purposes of this Act, and for the purposes of any proceeding or investigation of the Commission under section 11 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914 (15 U. S. C. 21), the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpoenas, and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence."

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 864

JOHN T. MENZIES, PRESIDENT, CHEESE & BLACKWELL COMPANY, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. 35–40) has not yet been reported. The opinion of the United States District Court for the District of Maryland is reported at 145 F. Supp. 164.

JURISDICTION

The judgment of the Court of Appeals was entered on March 7, 1957. The petition for a writ of certiorari was filed on March 27, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Federal Trade Commission has subpoena power in proceedings under the Clayton Act.

STATUTES INVOLVED

Pertinent provisions of the Clayton Act (15 U. S. C. 12, *et seq.*) and the Federal Trade Commission Act (15 U. S. C. 41, *et seq.*) are set forth in the Appendix, *infra*, pp. 13–17.

STATEMENT

In November 1955, the Federal Trade Commission issued complaints against three corporations, charging each with discriminatory practices in violation of Section 2 (d) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. 13 (d) (J. A. 5–8).[1] In January 1956, the hearing examiner issued subpoenas *duces tecum* directing petitioners, who are the presidents of the corporations, to produce certain corporate records (J. A. 8–10, 12). Petitioners moved to quash the subpoenas on the ground, *inter alia*, that since the Clayton Act does not in terms grant the Commission subpoena power, and since Section 9 of the Federal Trade Commission Act authorizes the Commission to issue subpoenas only "for the purposes of this Act," the Commission has no subpoena power in proceedings under the Clayton Act (J. A. 12). The hearing examiner denied the motions (J. A. 11), and the Commission affirmed (J. A. 12–13). The subpoenas were not complied with, and the Commission then filed applications for their enforcement in the United

[1] "J. A." refers to appellants' Joint Appendix in the Court of Appeals.

States District Court for the District of Maryland (J. A. 28). The District Court, in a careful opinion (J. A. 27–38), granted the applications and directed enforcement (J. A. 38–39), and the Court of Appeals unanimously affirmed.

In holding that the Commission's subpoena power extends to proceedings under the Clayton Act, the Court of Appeals pointed out (Pet. 36–37) that the Clayton and Federal Trade Commission Acts were "before Congress at the same time and were in pari materia dealing with the same general subject matter, restraints of trade and unfair competition"; that the Clayton Act "laid down substantive rules of law and provided for their enforcement by courts and administrative agencies"; that the Federal Trade Commission Act created the Commission and conferred various powers upon it, including the power to investigate corporate business practices; and that the Commission's authority, under Section 11 of the Clayton Act, to enforce compliance with that Act (except as to banks and common carriers) "could mean nothing else than that, in carrying out this provision, the Commission should exercise the powers with respect to investigations and hearing vested in it by the act of its creation," including the "power to examine documents and witnesses and issue subpoenas" provided in Section 9 of the Federal Trade Commission Act.

The court rejected, as an "unreasonable and forced construction," petitioners' contention that the introductory phrase in Section 9, "for the purposes of this Act," limits the Commission's subpoena power to proceedings under the Federal Trade Commission Act, since

one of the "purposes of the act" was to give the Commission "adequate powers to conduct investigations and proceedings with respect to restraints of trade and unfair competition" (Pet. 38). The "manifest purpose" of Section 9, the court stated (*ibid.*), was "to give the Commission the power of subpoena and examination in connection with any investigation or proceeding which it was authorized by law to conduct." The court further stated (Pet. 36) that, in determining whether the Commission has subpoena power in Clayton Act proceedings, it was "not without significance" that for more than 40 years the Commission had exercised such power and had issued "many thousands of such subpoenas," and that it is "not reasonable to suppose" that such power would have "gone unchallenged" for so long a period "if there were any real doubts as to its existence."[2]

ARGUMENT

Petitioners, on the basis of a highly technical and artificial reading of Section 9 of the Federal Trade Commission Act, seek to overturn the settled administrative interpretation, of 40 years standing, that the Federal Trade Commission has subpoena power in proceedings under the Clayton Act. The court below, construing the Federal Trade Commission and the Clayton Acts *in pari materia*, concluded that neither the language nor the legislative history of either statute justifies such a crippling construction of Section 9—a

[2] The Court of Appeals also rejected, as had the Commission (J. A. 13) and the District Court (J. A. 35–38), petitioners' contention that the subpoenas were invalid for other reasons (Pet. 39–40). Petitioners do not make that contention here.

construction which, as the court pointed out (Pet. 39), "would in large measure defeat the purpose which Congress manifestly had in mind in the enactment of these statutes." The decision below is in accord with subsequent unanimous decisions by courts of appeals in two other circuits;[3] it is clearly correct; and there is no occasion for further review by this Court.

1. Section 11 of the Clayton Act authorizes the Federal Trade Commission (except in case of companies subject to the jurisdiction of certain other regulatory agencies) "to enforce compliance with" Sections 2, 3, 7, and 8 of the Act, and specifies the administrative and judicial procedures which the Commission is to follow in so doing. Section 9 of the Federal Trade Commission Act gives the Commission the power by subpoena to compel testimony and production of documentary evidence. The Court of Appeals ruled (Pet. 36) that the two statutes "were in pari materia dealing with the same general subject matter, restraints of trade and unfair competition" and, therefore, were to be construed together, and, so construing the acts, held

[3] In *Federal Trade Commission* v. *Tuttle* (C. A. 2, No. 232, April 2, 1957), and *Federal Trade Commission* v. *Reed* (C. A. 7, No. 11839, April 11, 1957), the courts upheld the Commission's subpoena power in Clayton Act proceedings. Pertinent portions of the opinion in the *Tuttle* case, and the opinion in the *Reed* case, are set forth in the Appendix, *infra*, pp. 18–23. Although Judge Medina dissented in the *Tuttle* case, it was on another issue.

Petitioners rely (Pet. 7, 25, 32) on *Federal Trade Commission* v. *Rubin*, 145 F. Supp. 171 (S. D. N. Y.), in which the District Court held that the Commission has no subpoena power in Clayton Act proceedings. That case is pending on appeal to the Court of Appeals for the Second Circuit. In view of the *Tuttle* case, however, the *Rubin* case is not the law in the Second Circuit.

that the Commission's subpoena power under Section 9 of the Trade Commission Act extends to proceedings to enforce the Clayton Act.

Statutes are *in pari materia* when they "relate to the same person or thing, or to the same class of persons or things, or have the same purposes or object." 2 Sutherland on *Statutory Construction* (3rd ed.), Section 5202 at pp. 535–536. The Federal Trade Commission Act and the Clayton Act were both intended by Congress to deal with anticompetitive practices "in their incipiency," and their "great purpose" was to secure "fair opportunity for the play" of economic forces and to protect the public from "abuses arising in the course of" competition. *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 647; cf. *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463, 476. "It is obvious, therefore, that in order to carry into execution the intention of" Congress, these two statutes, which deal with "the same subject-matter must be taken together and construed in connection with each other." *Converse* v. *United States*, 21 How. 463, 467; *United States* v. *Freeman*, 3 How. 556, 564; cf. *United States* v. *Stewart*, 311 U. S. 60, 64–65; *British-American Oil Producing Co.* v. *Board of Equalization*, 299 U. S. 159, 166. This rule is particularly applicable where, as here, the statutes not only relate to the same subject matter but were considered at the same session of Congress, debated together, and enacted within a short time of each other.[4]

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[4] The Federal Trade Commission Act was enacted on September 26, 1914, and the Clayton Act on October 15, 1914.

When the statutes are construed together, we think it clear that the Commission's subpoena power extends to proceedings under the Clayton Act. As the Court of Appeals noted, the Clayton Act "laid down substantive rules of law and provided for their enforcement by courts and administrative agencies." Section 11 of that Act vested enforcement thereof (except as to certain companies) in the Federal Trade Commission, and set forth the procedures which the Commission is to follow. But such specification of procedures does not preclude the Commission from using its general investigatory and subpoena powers in carrying out its Clayton Act enforcement functions. Those powers are provided in the statute which created the Federal Trade Commission, and we submit that they may be utilized in the performance of all duties with which the Commission is charged—including that of enforcing the Clayton Act.

Petitioners argue (Pet. 12–14) that since Section 9 of the Trade Commission Act contains the introductory phrase "for the purposes of this Act," the subpoena power which that Section grants is limited to proceedings to enforce that Act.[6] But "the purposes" of the Act are broader than the mere conduct of such proceedings. The heading of the Trade Commission Act states that it is an Act "[to] create a

[6] As petitioners note (Pet. 13), the United States Code, 15 U. S. C. 49, substitutes for the phrase "for the purposes of this Act" the phrase "for the purposes of section 41–46 and 47–58 of this title." However, the language of the Statutes at Large prevails over the wording of a Code title which, as here, has not been enacted into positive law.

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Federal Trade Commission, to define its powers and duties, and for other purposes." The Commission is not only charged with preventing unfair methods of competition and with conducting general investigations of anticompetitive practices (Sections 5 and 6 of the Trade Commission Act, respectively), but also with enforcing the Clayton Act. The fact that the latter duty is given to the Commission by the Clayton Act rather than by the Trade Commission Act does not make its performance any the less one of the functions for which the Commission was created. Thus, assuming that the phrase "for the purposes of this Act" qualifies the Commission's subpoena power,* we submit that a subpoena issued in proceedings under the Clayton Act is for such purpose.

The fact that Section 11 of the Clayton Act does not expressly grant the Commission subpoena power does not show, as petitioners contend (Pet. 20–27), that Congress intended to deny the Commission such power. On the contrary, a more reasonable explanation of the absence of specific subpoena power in Section 11 is that "Congress evidently concluded that it was unnecessary to incorporate the full subpoena power in both Acts and was content to set it forth in Section 9 of the Federal Trade Commission Act." *Federal Trade Commission* v. *Tuttle*, C. A. 2,

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* The phrase "for the purposes of this Act" precedes the clause in Section 11 authorizing the Commission to inspect and copy documentary evidence, and this clause is separated by a semicolon from the succeeding clause granting the subpoena power. Thus, it is arguable that the "purposes" limitation does not appy to the subpoena power but only to the power to inspect and copy.

Appendix, *infra*, p. 20. The language of Section 11 supports this view. The last paragraph of that Section prescribes the procedure for serving "[c]omplaints, orders, and *other processes* of the Commission" (emphasis added). The words "*other* processes" plainly cover subpoenas.[7]

Nor does the fact that Congress, in later statutes giving the Commission additional duties, explicitly authorized the Commission to exercise all of its powers under the Federal Trade Commission Act establish (as petitioners contend, Pet. 14–19) that the Commission was not intended to exercise such powers under the Clayton Act. Since the later statutes were passed many years after the Federal Trade Commission Act and deal with a much narrower area of unfair trade practices, they may not be *in pari materia* with the Federal Trade Commission Act. Congress, therefore, apparently deemed it desirable to state that, in enforcing those statutes, the Commission was to exercise all its powers under the Federal Trade Commission Act.

During the forty years that it has enforced the Clayton Act, the Commission consistently has con-

[7] Petitioner contends (Pet. 9) that a bill recently introduced in Congress (Pet. 41) to amend Section 9 of the Trade Commission Act to make the Commission's subpoena power expressly applicable to Clayton Act proceedings "specifically recognizes that the Clayton Act does not contain subpoena powers." But the bill, as its title states, is merely intended to "clarify" the Commission's subpoena powers under Section 9, and such a bill does not necessarily imply a present lack of power. In any event, the mere introduction of a bill to amend a statute "is without meaning for purposes of statutory interpretation." *Order of Railway Conductors* v. *Swan*, 329 U. S. 520, 529.

strued its subpoena power as extending to proceedings under that Act. As the Court of Appeals pointed out (Pet. 36), it is "not reasonable to suppose" that the use of such power would have "gone unchallenged" for so long a period if there "were any real doubts as to its existence." An "administrative practice, consistent and generally unchallenged," will not be disturbed if the statutory command is "indefinite and doubtful" (*Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315), particularly where, as here, the practice is necessary to carry out "the declared will of the legislative body" (*Alaska Steamship Co.* v. *United States*, 290 U. S. 256, 262).

2. Petitioners' construction of the Acts would produce an "unreasonable" result which is "plainly at variance with the policy of the legislation as a whole." *United States v. American Trucking Associations*, 310 U. S. 534, 543. As the Court of Appeals pointed out in the *Tuttle* case (Appendix, *infra*, pp. 19–20), "[a]n adequate subpoena power is essential to any investigation of offenses under the Clayton Act and to the enforcement" of its provisions. Clayton Act proceedings generally involve broad and complex issues, and their resolution usually requires a detailed study of pricing, distribution, and competitive practices in the industry concerned. Without subpoena power to obtain the necessary information relating to such practices, the Commission would be unable effectively to carry out its statutory duty to "enforce compliance" with the Clayton Act.

Moreover, since the issues in Clayton Act and in Federal Trade Commission Act proceedings frequently are

similar, and sometimes overlap, it would be anomalous if Congress had granted the Commission subpoena power under the latter Act but denied it such power under the former. Indeed, the Commission may charge violation of both Acts in the same proceeding based on the same or similar practices (cf. *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683; *E. B. Muller & Co.* v. *Federal Trade Commission*, 142 F. 2d 511 (C. A. 6)), and it would make little sense in such cases to permit the Commission to subpoena only such material as is pertinent to the charge under the Federal Trade Commission Act. Finally, as the Court of Appeals pointed out (Pet. 39), the Commission could have issued subpoenas under Section 9 of the Federal Trade Commission Act if, prior to issuing a formal complaint under the Clayton Act, it had conducted an investigation (under Sections 5 or 6 of the Federal Trade Commission Act) into these same discriminatory practices; and it could have used "the information thus obtained in a subsequent proceeding to enforce the provisions of the Clayton Act." As the court correctly concluded (*ibid.*), the Commission's power to issue subpoenas and conduct the investigation "is not less" because, by issuing a complaint under the Clayton Act, it gives notice that such information is to be used to enforce that Act.

CONCLUSION

The decision of the Court of Appeals is correct, and there is no conflict of decisions. Accordingly, it is

respectfully submitted that the petition for a writ of certiorari should be denied.

J. Lee Rankin,
Solicitor General.
Victor R. Hansen,
Assistant Attorney General.
Daniel M. Friedman,
Ernest L. Folk III,
Attorneys.

Earl W. Kintner,
General Counsel,
Robert B. Dawkins,
Assistant General Counsel,
Federal Trade Commission.

April 1957.

APPENDIX

Section 2 (d) of the Clayton Act, 15 U. S. C. 13, provides as follows:

> It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Section 11 of the Clayton Act, 15 U. S. C. 21, provides as follows:

> Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade

Commission where applicable to all other character of commerce to be exercised as follows:

Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or Board requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a United States court of appeals, as hereinafter provided, the Com-

mission or Board may at any time, upon such notice, and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person fails or neglects to obey such order of the Commission or Board while the same is in effect, the Commission or Board may apply to the United States court of appeals, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission or Board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission or Board. The findings of the Commission or Board as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission or Board, the court may order such additional evidence to be taken before the Commission or Board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission or Board may modify its findings as to the facts, or make new findings, by reason of the additional evi-

dence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section 1254 of Title 28.

Any party required by such order of the Commission or Board to cease and desist from a violation charged may obtain a review of such order in said United States court of appeals by filing in the court a written petition praying that the order of the Commission or Board be set aside. A copy of such petition shall be forthwith served upon the Commission or Board, and thereupon the Commission or Board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission or Board as in the case of an application by the Commission or Board for the enforcement of its order, and the findings of the Commission or Board as to the facts, if supported by substantial evidence, shall in like manner be conclusive.

The jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission or Board shall be exclusive.

Such proceedings in the United States court of appeals shall be given precedence over cases pending therein, and shall be in every way expedited. No order of the Commission or Board or the judgment of the court to enforce the same shall in anywise relieve or absolve any person from any liability under the antitrust Acts.

Complaints, orders, and other processes of the Commission or Board under this section may be served by anyone duly authorized by the Commission or Board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

Section 9 of the Federal Trade Commission Act, 38 Stat. 722, 15 U. S. C. 49, provides in pertinent part as follows:

> That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.
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> * * * * *

United States Court of Appeals For the Second Circuit

No. 232—October Term, 1956

(Argued January 16, 1957. Decided April 2, 1957.)

Docket No. 24325

FEDERAL TRADE COMMISSION, PETITIONER-APPELLANT

v.

W. W. TUTTLE, RESIDENT MANAGER, ERNST & ERNST, RESPONDENT-APPELLEE

Before: Medina and Hincks, Circuit Judges, and Leibell, District Judge.

* * * * *

LEIBELL, *District Judge*

The question to be decided on this appeal concerns the power of the Federal Trade Commission under Section 9 of the Federal Trade Commission Act, to subpoena documents and records of third parties "In the Matter of A. G. Spalding & Bros. Inc," a corporation against which the Commission had filed a complaint, charging it with a violation of Section 7 of the Clayton Act (T. 15 U. S. C. § 18). The District Court denied an application by the Commission for an order enforcing a subpoena *duces tecum* to compel Ernst & Ernst, the accountants for the Athletic Goods Manufacturers Association, to produce records of members of the Association in the possession of the accountants, and their own records relating thereto.

* * * * *

Defendant's contention that the Federal Trade Commission does not have the power to issue subpoenas in a proceeding under the Clayton Act, overlooks the fact that both the Clayton Act and Federal Trade Commission Act were under consideration by

the Congress at the same time;[4] that the Congressional debates show that investigations under the Clayton Act were to be conducted by the Commission;[5] that the Commission is mentioned in Sections 2, 7 and 11 of the Clayton Act; and that under Section 11 of the Clayton Act (§ 21 of T. 15 U. S. C.) the Federal Trade Commission is authorized to enforce compliance with Section 7 of the Clayton Act (§ 18 of T. 15 U. S. C.). Likewise the Commission was granted the power under Section 1 of the Robinson-Patman Act (§ 13 of T. 15 U. S. C.) to investigate and institute proceedings to enforce the provisions of the Robinson-Patman Act. The Supreme Court has held that the Commission possesses "broad power of investigation and subpoena" which it may use prior to the filing of a complaint for price discrimination, a violation of the Robinson-Patman Act. *Automatic Canteen Co.* v. *F. T. C.*, 346 U. S. 61, 79. The subpoena power necessary for that purpose is found in Section 9 of the Federal Trade Commission Act. The Robinson-Patman Act contained no subpoena powers.

An adequate subpoena power is essential to any investigation of offenses under the Clayton Act[6] and

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[4] The Federal Trade Commission Act was enacted by the 63rd Congress (2nd Session) on September 26, 1914, and the Clayton Act was enacted October 15, 1914.

[5] 51Cong. Rec. 12918; 14475; 13214; 14090; 14222; 16162; 16319; 16332.

[6] Chap. 323, 38 Stat. 730 (Oct. 15, 1914).

The Federal Trade Commission Act supplements the Clayton and Sherman Acts; and Section 5 of the Federal Trade Commission Act "minimally registers violations of the Clayton and Sherman Acts." *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594, 609. The Federal Trade Commission has the power to suppress as unfair competition, practices of a combination that run counter to the public policy declared in the Sherman and Clayton Acts. *Fashion Guild* v. *Trade Comm'n*, 312 U. S. 457, 463 (footnote 1).

to the enforcement of Section 7 of that Act. The Congress evidently concluded that it was unnecessary to incorporate the full subpoena power in both Acts and was content to set it forth in Section 9 of the Federal Trade Commission Act.[7] The Congress followed a similar course in later anti-monopoly and unfair trade-practices Acts,[8] relating to certain specific industries or markets, and it did not in those Acts set forth the subpoena powers required for the investigations to be conducted by the Commission.

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[7] See opinion of Thomsen, C. J. (Md.) in *Federal Trade Commission* v. *Menzies*, 145 F. Supp. 164, 168 in support of this power, and opinion of Judge Dimock (S. D. N. Y.) in *Federal Trade Commission* v. *Rubin*, 145 F. Supp. 171, *contra*, presently on appeal to this Court (Docket #24449).

On appeal to the Fourth Circuit Court of Appeals, that Court, in an opinion by Parker, C. J., affirmed on March 7th Judge Thomsen's decision in the *Menzies* case, and held that in a proceeding against three corporations, which were charged with the violation of Section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act, the Federal Trade Commissior could exercise its right to subpoena records under Section 9 of the Federal Trade Commission Act.

A recent (Feb. 15, 1957) opinion of Judge Hoffman (No. Dist. of Ill.) holds that the "subpoena power conferred upon the Commission is available to it in the discharge of its duties under this Clayton Act," citing *F. T. C.* v. *Reed Candy Co.*, another Northern District Illinois case, decided June 12, 1956.

[8] The Acts under which the Federal Trade Commission exercises responsibilities are listed in Section 1.2 entitled "Laws Administered" under Subpart A of Part 1 (setting forth general procedures and rules of practice of the Federal Trade Commission) 15 U. S. C. A. § 1.2 of the 1956 Cumulative Annual Pocket Part for Title 15, §§ 41 to 80.

In the United States Court of Appeals
For the Seventh Circuit

No. 11839

September Term 1956—April Session 1957

FEDERAL TRADE COMMISSION, PETITIONER-APPELLEE

v.

WILLIAM T. REED, PRESIDENT, REED CANDY COMPANY, RESPONDENT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

April 11, 1957

Before Duffy, Chief Judge, Lindley and Swaim, Circuit Judges.

SWAIM, *Circuit Judge*

This appeal questions the power of the Federal Trade Commission to issue subpoenas duces tecum in proceedings before the Commission on a complaint charging violation of the Clayton Act, as amended.

On November 21, 1955, the Federal Trade Commission ("F. T. C.") issued a complaint charging the Reed Candy Company with violation of Section 2 (d) of the Clayton Act, as amended. 49 Stat. 1526, 15 U. S. C. A. § 13 (d). The proceeding was duly assigned to an examiner of the F. T. C. for hearing and initial decision. The examiner, on February 20, 1956, caused a subpoena duces tecum to be served on William T. Reed, as President of the Reed Candy Company, directing him to appear and testify before the F. T. C. and to produce certain documentary evidence described in the subpoena. Reed's motion to quash the subpoena was denied by the examiner and on appeal to the F. T. C. the examiner's ruling was af-

firmed. On April 4, 1956, another subpoena was issued which was identical in all respects with the first except that the date for the hearing was set for April 11, 1956. Reed did not appear at the April 11 hearing, but his counsel was present and he explained that Reed's refusal to obey the subpoena was upon the advice of counsel that the F. T. C. lacked subpoena power in proceedings under the Clayton Act.

On May 7, 1956, the F. T. C. filed an application in the United States District Court for the Northern District of Illinois, Eastern Division, for an order requiring Reed to comply with the subpoena. The District Court ordered Reed to appear and show cause why the application should not be granted. After answer to the application of the F. T. C. and a hearing on the matter the District Court, on June 12, 1956, entered an order directing compliance by Reed with the subpoena. From that order Reed has taken this appeal.

The arguments of the parties may be briefly summarized as follows: Reed contends that the Clayton Act, 38 Stat. 730, as amended, 15 U. S. C. A. §§ 12–27, prescribes a self-contained procedure for the enforcement of its provisions and does not contain a substantive grant of subpoena power. The F. T. C. contends that the subpoena and investigational powers granted it by the Federal Trade Commission Act, 38 Stat. 717, as amended, 15 U. S. C. A. §§ 41–46 and 47–58, may properly be used in the discharge of the F. T. C.'s duties under the Clayton Act, as amended. This question has recently been the subject of decision in the district courts. *Federal Trade Commission* v. *Menzies,* D. C. Md., 145 F. Supp. 164 (holding for the F. T. C.); and *Federal Trade Commission* v. *Rubin, S. D. N. Y.,* 145 F. Supp. 171 (holding against the F. T. C.).

During the pendency of this appeal the *Menzies* decision has been reviewed and affirmed by the Court of Appeals for the Fourth Circuit, per Judge John J. Parker, *Menzies* v. *Federal Trade Commission* (No. 7352, decided March 7, 1957), — F. 2d —. We agree with the Fourth Circuit that the history, purpose and decisional law concerning the Clayton and Federal Trade Commission Acts demonstrates that they are in pari materia—to be read and construed as one in such manner as to best effectuate the purpose of Congress in enacting them. We hold that the F. T. C. may properly use the subpoena power granted it by Section 9 of the Federal Trade Commission Act, 38 Stat. 722, 15 U. S. C. A. § 49, in proceedings before the F. T. C. on a complaint charging violation of the Clayton Act, as amended.[1] Even if the question were more doubtful than we think, we should be hesitant to reject the conclusion of the F. T. C. fortified as it is by years of administrative practice, consistent and generally unchallenged.

The order of the District Court is affirmed.

A true Copy:

Teste:

_____ _____,

Clerk of the United States Court of Appeals for the Seventh Circuit.

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[1] On April 2, 1957, the Court of Appeals for the Second Circuit sustained the power of the F. T. C. to subpoena documents pursuant to Section 9 of the Federal Trade Commission Act in a proceeding before the F. T. C. on a complaint charging violation of Section 7 of the Clayton Act. *Federal Trade Commission* v. *W. W. Tuttle, Resident Manager, Ernst & Ernst* (No. 24325), —— F. 2d ——.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 864

JOHN T. MENZIES, PRESIDENT, CROSSE & BLACKWELL COMPANY; CHARLES P. McCORMICK, PRESIDENT, McCORMICK & COMPANY, INC.; AND SAMUEL H. HOFFBERGER, PRESIDENT, POMPEIAN OIL CORPORATION, *Petitioners*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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The Daily Record Co., Baltimore 3, Md.

IN THE

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FEDERAL TRADE COMMISSION, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

Discussion — Commission's Brief and Recent Decision of Commission in Food Fair Case.

The Federal Trade Commission admits that the doctrine of statutes *in pari materia* does not apply to limited areas of unfair trade practices over which the Commission has been given jurisdiction by statutes other than the Federal Trade Commission Act. The Commission's brief opposing

the petition for Writ of Certiorari in discussing statutes giving the Commission jurisdiction to administer special areas involving unfair trade practices, at page 9, states:

> "Since the later statutes were passed many years after the Federal Trade Commission Act and deal with a much narrower area of unfair trade practices, they may not be *in pari materia* with the Federal Trade Commission Act."

The present case comes directly within the above text of the Commission's brief, as evidenced by an examination of the recent decision — *In the Matter of Food Fair Stores, Inc., a corporation, Federal Trade Commission Docket 6458*, decided April 11, 1957, since the filing of the petition in this case.*

In the Food Fair Stores, Inc. case, it was charged by the Commission that Food Fair Stores:

> " * * * knowingly induced and received from suppliers (petitioners) advertising allowances which those suppliers (petitioners) had not made available on proportionately equal terms to all of their other customers competing with respondent in the retail sale of such suppliers' (petitioners') products and that respondent knew this. In short, the respondent knowingly induced a violation of section 2(d) of the Clayton Act by its suppliers (petitioners)."

The issue in this case was whether Food Fair Stores was subject to the jurisdiction of the Federal Trade Commission under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, etc., as claimed by the Federal Trade Commission, or was subject to the jurisdiction of the Secretary of Agriculture under a later statute, the Packers and Stockyards Act of 1921, 7 U.S.C. 191, etc. The Hearing Examiner

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* Copy of Decision is attached to this Reply Brief.

found that the Federal Trade Commission had no jurisdiction over this matter and that the Secretary of Agriculture alone, under the later Packers and Stockyards Act, had jurisdiction in this matter.

Thus, in the present case, a later statute (Packers and Stockyards Act), passed seven years after the Federal Trade Commission Act, has excluded the Federal Trade Commission from a narrow area of unfair trade practices. To paraphrase the position of the Federal Trade Commission as set forth on page 7 of the Commission's brief:

> "Since the later statute(s) was (were) passed many years after the Federal Trade Commission Act, and deals with a much narrower area of unfair trade practices, it is not (they may not be) *in pari materia* with the Federal Trade Commission Act."

In the present case, the Commission argued (a) that Food Fair had violated the Federal Trade Commission Act; (b) that your Petitioners had violated the Clayton Act, as amended by the Robinson Patman Act, which violation was also a violation of the Federal Trade Commission Act; and (c) that *a fortiori* since both Acts were passed at or about the same time, and involved offenses violating the Federal Trade Commission Act, it followed that both Acts were *in pari materia* and that the subpoena power of the Federal Trade Commission was a part of the Clayton Act as amended by the Robinson Patman Act. While the *a fortiori* of this argument admittedly ignores the clear and unequivocal language of the Federal Trade Commission Act, its sheer absurdity in the present case is more than obvious.

The facts of the present case are as follows:

1. Food Fair has not violated the Federal Trade Commission Act;

2. Your Petitioners are not charged with a violation of the Federal Trade Commission Act;

3. The Packers and Stockyards Act has withdrawn a special area of unfair trade practices from the Federal Trade Commission Act;

4. Food Fair, if they have violated any Act, have violated the Packers and Stockyards Act.

5. Your Petitioners, if they have violated any Act other than the Clayton Act as amended by the Robinson Patman Act as alleged by the Commission, have violated the Packers and Stockyards Act.

6. Thus, the Federal Trade Commission Act has nothing to do with the case.

It therefore follows that the doctrine of *in pari materia* between the Federal Trade Commission Act and the Clayton Act, as amended by the Robinson Patman Act, can have no application in this case. To remedy this defect, the Commission has endorsed Senate Bill 1356 which would transfer jurisdiction over unfair trade practices in the meat industry to the Federal Trade Commission from the Secretary of Agriculture. To apply the doctrine of statutes *in pari materia* in this case is to incorporate the Federal Trade Commission Act into a case where neither party is charged with a violation of the Federal Trade Commission Act.

Since the Federal Trade Commission Act has no application in this case, it follows that the rights, limitations and procedural provisions set forth in the text of the Clayton Act, as amended by the Robinson Patman Act, and the text of the Packers and Stockyards Act must determine the rights, limitations and procedures under each Act without

adding additional rights, limitations and procedures from other Acts.

Respectfully submitted,

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Filed April 11, 1957

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

DOCKET No. 6458

In the Matter of

FOOD FAIR STORES, INC.,
a corporation

INITIAL DECISION

Frank Hier, Hearing Examiner

Andrew C. Goodhope, Frederic T. Suss, and Alvin C. Edelson, counsel supporting the complaint;

Stein, Stein & Engel, by Howard Engel, Jersey City, New Jersey, Gravelle, Whitlock & Markey, by Louis A. Gravelle, and Howrey & Simon, by David C. Murchison, Washington, D. C., counsel for the respondent.

In the midst of proof taking to support the allegations of the complaint, and immediately subsequent to the issuance by the Commission of amended complaint, respondent, by counsel, moves for complete dismissal for lack of jurisdiction. Since jurisdiction can be questioned at any time and is not conferred by consent, waiver, or failure to raise the point, at any previous time, the motion is timely and proper. The ground of the motion is that respondent's acts and practices, including those challenged by the complaint herein, are in the exclusive jurisdiction of the Secretary of Agriculture because respondent is subject to the Packers and Stockyards Act of 1921, U.S.C. 191 et seq.

Respondent herein is a supermarket grocery chain of 238 stores located along the Atlantic Seaboard from New Eng-

land to Florida, selling a full line of grocery and household products including fresh and canned meat and meat products. Its gross sales were about $475,000,000 for the fiscal year ending April 28, 1956. It was organized about 1933. The charge against it in this proceeding is that it knowingly induced and received from suppliers advertising allowances which those suppliers had not made available on proportionally equal terms to all of their other customers competing with respondent in the retail sale of such suppliers' products and that respondent knew this. In short, that respondent knowingly induced a violation of section 2(d) of the Clayton Act by its suppliers.

On July 13, 1945, respondent acquired a meat packing plant at 406 Allen Street, Elizabeth, New Jersey, at which place it has since slaughtered livestock and prepared same for consumption, selling and shipping in commerce to the extent of $25,000,000, or 95,000,000 pounds, for the fiscal year ending April 28, 1956. Respondent's investment in said plant is $2,700,000. The products thereof are federally inspected and respondent is listed and licensed by the Department of Agriculture as a packer. Counsel supporting the complaint concedes that "to the extent it operates its meat packing plant in Elizabeth, New Jersey," respondent is a packer within the statutory definition set out in 7 U.S.C. 191, 42 Stat. 160, which reads as follows:

> "When used in this chapter—
>
> The term 'packer' means any person engaged in the business (a) of buying livestock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, or (c) of manufacturing or preparing livestock products for sale or shipment in commerce, or (d) of marketing meats, meat food products, livestock products, dairy products, poultry, poultry products, or eggs, in commerce; but no person engaged in such business of manufacturing or preparing livestock products or in such marketing business shall be considered a packer unless—

(1) Such person is also engaged in any business referred to in clause (a) or (b) of this section, or unless

(2) Such person owns or controls, directly or indirectly, through stock ownership or control or otherwise, by himself or through his agents, servants, or employees, any interest in any business referred to in clause (a) or (b) of this section, or unless

(3) Any interest in such business of manufacturing or preparing livestock products, or in such marketing business is owned or controlled, directly or indirectly, through stock ownership or control or otherwise, by himself or through his agents, servants, or employees, by any person engaged in any business referred to in clause (a) or (b) of this section, or unless

(4) Any person or persons jointly or severally, directly or indirectly, through stock ownership, or control or otherwise, by themselves or through their agents, servants, or employees, own or control in the aggregate 20 per centum or more of the voting power or control in such business of manufacturing or preparing livestock products, or in such marketing business and also 20 per centum or more of such power or control in any business referred to in clause (a) or (b) of this section. Aug. 15, 1921, c. 64, §201, 42 Stat. 160."

Section 406(b) of that same statute (7 U.S.C. 227, 42 Stat. 169) provides "on or after the enactment of this Act, and so long as it remains in effect, the Federal Trade Commission shall have no power or jurisdiction so far as relating to any matter which by this Act is made subject to the jurisdiction of the Secretary, except in cases in which, before the enactment of this Act, complaint has been served under Section 5 of the act entitled 'An Act To create a Federal Trade Commission, to define its powers and duties, * * *' and except when the Secretary of Agriculture, in the

exercise of his duties hereunder, shall request of the said Federal Trade Commission that it make investigations and report in any case (August 15, 1921, Chapter 64, Section 406, 42 Stat. 169; 7 U.S. Code Section 227)." The two exceptions mentioned in the above code section are obviously inapplicable to this proceeding and it will be noted that the jurisdictional exclusion is as "to any matter which by this Act, is made subject to the jurisdiction of the Secretary * * *."

The *matter* above referred to is obviously that which is contained in Section 202, 7 U.S.C. 192 of that Act which reads as follows:

Unlawful Practices Enumerated

It shall be unlawful for any packer or any live poultry dealer or handler to:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in commerce; or

(b) Make or give, in commerce, any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject, in commerce, any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; or

(c) Sell or otherwise transfer to or for any other packer, or any live poultry dealer or handler, or buy or otherwise receive from or for any other packer or any live poultry dealer or handler any article for the purpose or with the effect of apportioning the supply in commerce between any such packers, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly in commerce; or

(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices in commerce, or of creating a monopoly in the acquisition of, buying, selling, or dealing

in, any article in commerce, or of restraining commerce; or

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices in commerce, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article in commerce, or of restraining commerce; or

(f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business in commerce, or (2) to apportion purchases or sales of any article in commerce, or (3) to manipulate or control prices in commerce; or

(g) Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a)-(d) or (e) of this section.

Obviously the above broad proscriptions include the charge of the complaint here. There follows detailed provisions for complaint, answer, hearing, decision and order by the Secretary of Agriculture with right of appeal therefrom to the United States Circuit Court of Appeals — procedure closely following that of the Federal Trade Commission (7 U.S.C. 193-4-5) and indeed there is a separate general provision (7 U.S.C. 222) adopting for the use of the Secretary of Agriculture in the enforcement of the Act, all of the implementing provisions of the Federal Trade Commission Act. It was probably this which led the Fourth Circuit Court of Appeals in United Corporation, et al. v. F.T.C., 110 F. 2d 473 to say:

> "It was doubtless because plenary power over the unfair trade practices of packers had been vested in the Secretary of Agriculture by the Packers and Stockyards Act and the Meat Inspection Act, that Congress withheld jurisdiction over packers from the Federal Trade Commission. Only confusion could result from an overlapping jurisdiction, as this case well illustrates."

On the basis of the above, counsel for respondent contends that it has an in personam immunity from supervision, investigation or correction by the Federal Trade Commission, being, by reason of its packing activities, subject in all of its operations exclusively to the jurisdiction of the Secretary of Agriculture. In a word, once in grace always in grace. Counsel supporting the complaint, on the other hand, contends that the exclusive jurisdiction of the Secretary of Agriculture is not personal, but is only as to matters given to him exclusively, and that the acts and practices of respondent challenged in the instant proceeding are not such a matter. His argument, so far as the examiner understands it, proceeds as follows:

(a) The Packers and Stockyards Act was aimed directly against the five big packers who, in 1917, handled 70.5 of all animals slaughtered under federal inspection.

(b) That these same five packers were under a 1920 consent decree forbidding them to engage in the retail distribution of grocery products including meat or meat products.

(c) That, therefore, the Packers and Stockyards Act was and is confined in its operation to slaughtering, processing, preserving, selling, and shipping meat and meat products in commerce, and does not cover the retail distribution thereof.

(d) Therefore, there was never conferred on the Secretary of Agriculture any jurisdiction whatever over the retail activities of any business coming within the statutory definition of packer, and, therefore, he has no jurisdiction over the great bulk of respondent's acts and practices.

The above quoted statutory provisions are clear and unambiguous and would seem to this hearing examiner to require no resort to legislative history for clarification. But all counsel seem to think the contrary, and quote extensively from that legislative history to sustain their conflicting contentions.

Without extensive quotations from that legislative history, it is plain therefrom that while the consent decree of 1920, which barred the five major packers from engaging in most retail operations, was in the mind of Congress in 1921, it is also clear that Congress was legislating *for all business doing any meat packing whatsoever*, that the bill was intended to reach and regulate all phases of the business of any person, firm or corporation engaged in meat packing to any extent whatever, that the problem of "unrelated activities" was squarely before Congress and thoroughly considered, that the statutory definition of "packers" in Section 201 of the Act (7 U.S.C. 191) was made designedly broad so as to include all within its terms, "whatever the ramifications of his business, and whatever the form of corporate organization adopted," or "if such person has *an interest* in a packing business, as [above] defined or if a packer has *any interest* in his business." It is apparent that Congress was not legislating in a 1921 vacuum, but was legislating for the future and for an industry, and was keenly aware of extensions into other fields, and of other firms entering into the packing field. There is no evidence in this legislative history, that the Act was intended to be confined to those whose sole or primary business was meat packing. On the contrary, the House of Representatives was pressured by the Farm Bureau to narrow the definition of "packer" to just manufacturing or preparing meats and meat products for sale — in other words, just to meat packing — but this was flatly rejected: — the expressed intention then being "to relieve from regulation (by the Secretary of Agriculture) those outside industries only when having *no affiliation* with a packer." "Affiliation" is a broad and significant word. Finally, on this point, it is most significant to this hearing examiner that in 1938 when Congress was enlarging the jurisdiction of the Federal Trade Commission by adopting the Wheeler-Lea Amendment, and then having before it the extensive hearings preceding the Robinson-Patman Act, and their disclosure of new and devious anti-competitive practices which had come to life in the intervening years, with the knowledge of backward and forward integration occurring during the 1920 decade,

was most careful to except from the new grant of additional jurisdiction "persons, partnerships or corporations subject to the Packers and Stockyards Act, 1921, except as provided in Section 406 (b) of said Act." This careful additional exclusion of jurisdiction, not there before and coming 18 years later in that setting, seems to this hearing examiner to refute any claim that Congress in 1921 was legislating only about five packers, was not legislating as to retail activities, or "unrelated operations." It seems a re-affirmation of a firm intent to have the Secretary of Agriculture regulate all phases of any business in whatever primary field, connected in any way, or operating to any degree, in meat packing. There is, therefore, no necessity for deciding whether the exemption is in personam or merely in rem.

This interpretation logically and inevitably leads, counsel in support of the complaint contends, to absurd results enabling any concern to choose at will the regulatory authority, by simply acquiring or divesting itself of a packing plant. Or, put more crassly, by the simple expedient of buying a load of chickens, wringing their necks, plucking their feathers and selling their carcasses in commerce, any business in the nation, even a tire or battery manufacturer, for instance, may escape regulation of its entire business by the Federal Trade Commission, whose "expertise" in the use, for instance, of brokerage, advertising allowances, service grants and other devious means of competitive favoritism, is widely recognized. Thus, in the instant case, alleged competitive discrimination in the use of advertising allowances to push such non-agricultural products as floor wax, chewing gum and cleaning fluid is left exclusively to the Department of Agriculture. No law, says counsel, should be interpreted to achieve an absurd result.

The answer, of course, is that where a law is clear and unambiguous in terms, command, and intent and where the latter is also clear from the legislative history, interpretation is uncalled for and no deciding authority may interpose his views and interpret it away from that intent, regardless of result. The responsibility for the latter, any duty to change, as well as the sole right to change, lies with

the enacting authority, Congress. That this is recognized by that body is evidenced by the recent introduction for passage by Congress of S. 1356 to confer on the Federal Trade Commission the very jurisdiction contended for here, and by the statement of its sponsor:

> "I believe it is in the public interest that Federal Trade Commission's control be extended over packers who enter into other side-line businesses — businesses which now escape such control because of United States Department of Agriculture's inaction, but whose competitors are subject to Federal Trade Commission's control. The same need for public control applies to food firms, especially food chains, which can now acquire packing plants, or a substantial interest in one, and thus escape Federal Trade Commission's supervision over their entire operations."

Despite distinctions of counsel, which are really not actual differences, the views expressed, and the language used in United Corporation, et al. v. F.T.C., 110 F. 2d 473 (C.C.A. 4) (1940) and Docket 6409, Armour and Company (March 30, 1956) are consonant with, and, it is believed, fully support the views expressed, and the conclusion reached here, and these are precedents by which this hearing examiner is, of course, bound.

Express findings on this motion then are:

1. Respondent comes within the definition of "packer" as set out in 7 U.S.C. 191, not only as to its Elizabeth, New Jersey plant but as an entity.
2. As such, the Secretary of Agriculture has exclusive jurisdiction of the acts and practices charged in the complaint to be illegal.
3. The Federal Trade Commission has no jurisdiction thereof.

It follows that the motion of respondent to dismiss should be and the same hereby is granted.

Any and all requests for time to brief further the motion are denied.

ORDER

IT IS ORDERED that the complaint and the amended and supplemental complaint in this proceeding be, and the same hereby are, dismissed for lack of jurisdiction.

FRANK HIER,
Hearing Examiner.

April 11, 1957.